Summary of Plaintiffs' Response to Question 8

Question: Which of plaintiffs' claims could survive if AT&T received a certification from the government?

Answer: **All of them.** *Assuming* that AT&T was provided a certification that meets the formal requirements of 18 U.S.C. § 2511(2)(a)(ii), e.g., it is a "certification in writing by a person specified in Section 2518 (7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required," and *assuming* AT&T acted only "in accordance" with its terms, all of plaintiffs' claims would still survive.

The safe harbor clause of Section 2511(2)(a)(ii) ("No cause of action…") applies only to conduct otherwise authorized "under this chapter," i.e., Title III. Other statutes supporting our claims have their own "no cause of action…" safe harbors which are also limited to conduct authorized within those specific statutes, and none applies here.

Count I—Constitutional Amendments I & IV. No certification defense exists to plaintiffs' Constitutional claims. *LaGuerre v. Reno*, 164 F.3d 1035, 1038-40 (7th Cir. 1998) (statutory language directing that deportation orders "shall not be subject to review by any court" did not preclude review of constitutional claim).

Count II—Electronic Surveillance under FISA. Absent a court order, FISA's safe harbor under 1805(i) only applies to conduct "in accordance with…a request for emergency assistance under this chapter….", which is limited to 72 hours. 50 U.S.C. § 1805(f).

Count III—Interception, Disclosure and Use under Title III. A certification under § 2511(2)(a)(ii) only provides safe harbor for assistance consistent with an emergency request under 18 U.S.C. § 2518(7), which is limited to 48 hours absent a court order.

Count IV—Disclosure of Communications under Telecommunications Act, 47 U.S.C. § 605. Prohibits AT&T's conduct unless "authorized by chapter 119, title 18," i.e., Title III. 47 U.S.C. § 605. But conduct was not authorized, see above.

Count V & VI—Disclosure of Communications Content and Records Under Stored Communications Act. Safe harbor limited to a "certification under this chapter." 18 U.S.C. § 2703(e). Only certification in that chapter is one accompanying a request under 18 U.S.C. § 2709, which 1) can only reach records, not content; 2) may only seek the records of a specific person or entity; and 3) may only be made by the FBI.

Count VII—Cal. Bus. And Prof. Code 17200 claim based on violation of Pen/Trap Statute. Safe harbor in Pen/Trap Statute limited to conduct "in accordance with a court order under this chapter or request pursuant to section 3125 of this title." 18 U.S.C. § 3124(d). An emergency request under 18 U.S.C. § 3125 is limited to 48 hours. *Id.*

Count VII—Cal. Bus. And Prof. Code 17200 claim based on violation of 47 U.S.C. 222 of Telecommunications Act for disclosure of CPNI. AT&T cannot disclose telephone records except "as required by law"; only law requiring such disclosure is the records provision of the Stored Communications Act, see Count VI above.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the following non-CM/ECF participants:

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